

1 Monday, -13 May, 1946

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3 INTERNATIONAL MILITARY TRIBUNAL
4 FOR THE FAR EAST
5 Court House of the Tribunal
6 War Ministry Building
Tokyo, Japan

7 The Tribunal met, pursuant to adjournment,
8 at 0935.

9 Appearances:

10 For the Tribunal, same as before.

11 For the Prosecution Section, same as before.

12 For the Defense Section, same as before.

13 (English to Japanese and Japanese
14 to English interpretation was made by
15 SHIMANOCHI, Toshiro of statements from the
16 floor, and English to Japanese interpretation
17 was made by MORI, Tomio of statements by the
18 President, Akira Itami acting as Monitor.)

19 MARSHAL OF THE COURT: The International
20 Military Tribunal for the Far East is in session and
21 is ready to hear any matter brought before it.

22 THE PRESIDENT: I have before me a request by
23 counselors UZAWA and KIYOSE, representing the whole of
24 the Japanese counsel, that the decision of this Court
25 dealing with the question of challenge of its Members

1 be reconsidered. It is also requested that I should
2 sit with the other Members in dealing with the question
3 of interpretation so far as it bears on the challenge.

4 The Members of the Tribunal refuse to review
5 their decision. The request is, therefore, refused.

6 DR. KIYOSE: Mr. President, the reason for
7 this challenge has not yet been presented. I wish to
8 be granted the opportunity to present the reasons.

9 (The interpreter was corrected by
10 Dr. KIYOSE in English as follows: "Not
11 challenge" but "a request to present the
12 reasons for the request to reconsider the
13 challenge.")

14 THE PRESIDENT: The decision was accepted
15 without question when it was given. This is a belated
16 request. The matter is closed.

17 The next matter on the paper is the motion
18 going to the jurisdiction of the Tribunal because of
19 the inclusion in the Indictment of "Crimes Against
20 Peace" and "Crimes Against Humanity."

21 The notice of motion is not confined to
22 grounds but extends to argument and has been supplemented
23 by further argument. However, we propose to waive the
24 irregularity and read it as being confined to grounds
25 without regard to the argument which will have to be

1 repeated independently.

2 DR. KIYOSE: I should now like to be permitted
3 to explain the motion with respect to the jurisdiction
4 of this Tribunal.

5 The first point is that this Tribunal does not
6 have the authority to try "Crimes Against Peace" and
7 "Crimes Against Humanity." Needless to say, the
8 Potsdam Declaration, advising surrender to Japan, issued
9 on the 26th of July, 1945, states that "stern justice
10 shall be meted out to all war criminals, including those
11 who have visited cruelties upon our prisoners." This
12 Declaration was acknowledged and signed when the
13 Instrument of Surrender was signed in Tokyo Bay on the
14 2d of September, the same year.

15 The Potsdam Declaration not only binds our
16 country but also binds the Allies. In other words, this
17 Tribunal is empowered to make charges and try what are
18 called "war criminals" in accordance with the tenth
19 article of the Potsdam Declaration, but not so empowered
20 to try those who cannot be considered as war criminals.

21 The Charter of this Tribunal stipulates
22 "Crimes Against Peace" and "Crimes Against Humanity."
23 However, if the Allies do not have the authority to try
24 these cases, neither does the Supreme Commander appointed
25 by the Allied Powers to represent the Allied Powers have

1 the power to consider such charges.

2 To grant authority or powers to others which
3 one does not possess himself is, in the light of inter-
4 national law, unfounded. Hence, it is necessary,
5 rationally and strictly, to circumscribe the limit of
6 what are considered as war criminals as stated in the
7 Declaration of Potsdam. In other words, we must limit
8 the interpretation of what is meant by "war criminals"
9 to that existing up to the 26th of July, 1945 - in other
10 words, at the time when this Declaration of Potsdam was
11 issued by the Allied Powers and at the time accepted
12 by Japan. In other words, up to that time the meaning
13 of "war crimes," as generally accepted by the nations
14 of the world, was those crimes relative to the violation
15 of the laws and rules of war -- rules and conventions of
16 war.

17 (The interpreter was corrected by
18 Dr. KIYOSE in English as follows: "Rules and
19 customs.")

20 Laws and customs of war. To give some con-
21 crete examples, there are four typical crimes: One,
22 the violations of belligerents; two, violations by
23 non-belligerents; three, plunder, espionage; and
24 another, war treason.

25 A Judge representing Britain is sitting in

1 this Tribunal. According to the British Manual of the
2 Laws of War, Article 141 --

3 (The interpreter was corrected by
4 Dr. KIYOSE in English as follows: "441.")

5 (Continuing) -- 441, a definition of "war
6 crimes" is set forth. In the next Article, namely,
7 Article 442, the various types of war crimes are given.
8 These, in other words, are the four that I have just
9 mentioned.

10 This meaning of "war crimes" is not confined
11 only to the Manual on the Laws of War of Great Britain
12 which I have just mentioned, but it is also likewise
13 understood in other countries.

14 "Crimes Against Peace." And, speaking of
15 this, whatever the nature of the war or character of
16 the war, the planning, the preparing, the initiating
17 and the waging of war cannot be considered as "Crimes
18 Against Peace" in accordance with the conception of war
19 held by the civilized nations of the world up to July,
20 1945.

21 I need not say that the Honorable Judges
22 here, the learned Judges here, are learned on the books
23 on international law and such well known books on
24 international law as that of Oppenheim or Hall. There
25 is no mention of planning a war as a war crime. Works

1 on international law widely known and well read in Japan,
2 namely, that by Dr. Sakutaro TACHI and by Dr. Jumpei
3 SHINOBU, mention war crimes but confine them to violations
4 of the laws and customs of war.

5 Some of the books give five classifications;
6 but, substantially, they are the same as that listed in
7 the Manual on the Laws of War published in Britain.

8 On the occasion of the promulgation of the
9 Charter of this Tribunal on the 19th of January, this
10 year, a special order was issued by His Excellency,
11 General of the Army, MacArthur, Supreme Commander of
12 the Allied Powers, stating that the Supreme Commander
13 from time to time declared that war criminals will be
14 punished from time to time. What is mentioned in this
15 special order, to the effect that it will be declared
16 from time to time in our interpretation, means that they
17 apply to Japan.

18 Declarations made against Germany or other
19 European Axis nations cannot be applied to Japan.
20 Whatever declarations are made, whether at the Moscow
21 or Yalta Conferences, against Germany cannot under any
22 circumstances be made applicable to Japan.

23 Mr. President, this is a very important
24 point. There is a very great difference between the
25 way in which Germany surrendered and Japan surrendered.

1 Germany, as you well know, Mr. President, resisted to
2 the very last, Hitler died or was killed, Goering
3 departed from the ranks, and Germany ultimately
4 collapsed. In the case of Germany, it was literally
5 an unconditional surrender. In other words, as regards
6 German war criminals, the Allies, if I may be permitted
7 to say so, could just as well have punished war crim-
8 inals without trial.

9 The forces of the Allied Powers had not yet
10 landed in Japan when the Potsdam Declaration was
11 proclaimed. In that Declaration, Article 5, it is
12 mentioned that the "Following are our terms. We will
13 not deviate from them."

14 (The interpreter was corrected by
15 Dr. KIYOSE in English as follows: "We shall
16 abide by these Articles.")

17 (Continuing) "Following are our terms. We
18 will not deviate from them."

19 It is an absolute mistake to bring charges
20 against Japanese war criminals -- that is, charges for
21 "Crimes Against Peace" and "Crimes Against Humanity" --
22 because the same charges happen to be made at the
23 trials at Nuernberg.

24 The Potsdam Declaration proposed to Japan
25 contained conditions; to borrow the words from civil

1 law, it presented Japan an offer. In other words, there
2 was a condition. It was this that was accepted, and it
3 is this that the Allies must observe.

4 One of the war aims of the Allies in this
5 war was respect for international law. If that is the
6 case, it has been our strong belief that interpretation
7 of the question of war crimes would under no circum-
8 stances go beyond the interpretations made by existing
9 international law. The Japanese people have also so
10 believed.

11 The Potsdam Declaration was accepted by the
12 Cabinet at that time headed by Premier Kantaro SUZUKI.
13 The question of punishing war criminals, or punishment
14 of war criminals -- the Potsdam Declaration was accepted
15 on the understanding that the punishment of war crimin-
16 als will take place in accordance with the commonly
17 accepted understanding of that term throughout the
18 world. To go beyond that is overstepping the bounds
19 of international law. We would like to know, therefore,
20 why new crimes should be charged after the acceptance
21 of that Declaration.

22 There are some people who argue that, if the
23 Anti-War Pact of 1928 which condemns war as an instru-
24 ment of national policy, is violated, that action be
25 considered as an aggressive war. Such an argument is

1 completely mistaken. The Anti-War Pact condemns war as
2 an instrument of national policy but does not consider
3 it a crime. As evidence, the Anti-War Pact just re-
4 ferred to was concluded in the year 1928 while the
5 British Manual on the Laws of War referred to before
6 was not written until the following year, 1929. From
7 the fact that this British Manual on the Laws of War,
8 written in 1929, confined "crimes" to those in violation
9 of the laws and customs of war after the Anti-War Pact
10 had been concluded, there is no ground for extending
11 the Anti-War Pact to including such questions as war
12 crimes.

13 I have read in news reports and books that
14 the Pan-American Conference in Havana resolved that
15 aggressive war should be considered as an international
16 war crime. However, that was merely a local agreement.
17 A local agreement, or treaty, or resolution binds only
18 those who participated in such local agreement; they do
19 not bind those who are outside of this area.

20 It is needless for me to say that such rules
21 are universal and universally applicable only after
22 those rules are agreed to and participated in by all the
23 countries of the world, or after such rules have been
24 established as an idea after many years of observance.

25 As already referred to, it is improper to

1 interpret international treaties and declarations on
2 the basis of rules established prior to them.

3 THE MONITOR: Correction: It is not possible
4 to interpret the international treaties or declarations
5 purely on the basis of the international treaties or
6 declarations proclaimed prior to the former treaties
7 and declarations.

8 DR. KIYOSE: Whether international treaties
9 or declarations, they may be interpreted in the light
10 of the materials which existed prior to a conclusion of
11 such treaties or issuance of such declarations but not
12 in accordance with the rules of law made after the
13 issuance of such declarations. Following the termin-
14 ation of the war, we made a study of documents and
15 other data from Europe. On the 8th of August, 1945,
16 at the Conference on War Crimes convened in London, a
17 resolution was adopted to amplify or extend the signif-
18 icance of war crimes.

19 MONITOR: Correction: "Decision was reached"
20 instead of "resolution was adopted."

21 DR. KIYOSE: In other words, this became
22 the Charter of the Nuernberg Tribunal. That was on
23 the 8th of August. We, however, are speaking of the
24 declaration issued on the 26th of July, prior to that.
25 To interpret the declaration of July 26th, the resolu-

1 tion made on August 8th is highly inconsistent and is
2 a matter which should be avoided by learned international
3 jurists. Indeed, I do not know whether there is in the
4 world today a problem more significant, or more import-
5 ant, or bigger than the problem of the jurisdiction
6 of this Tribunal.

7 The Declaration of Potsdam, may I repeat,
8 says that "stern justice shall be meted out to all war
9 criminals," but we in Japan at no time have ever
10 imagined that the interpretation of the war crimes
11 criminals mentioned in that Declaration should extend
12 to "Crimes Against Peace" and make charges against im-
13 portant statesmen in our political life, diplomats, and
14 other leaders in the public life of Japan. I presume
15 that there shall be rebuttals from the prosecution.
16 However, it is my request that this point be considered
17 calmly, without prejudice, and, as the Honorable Chief
18 Judge said at the opening of this Tribunal, that this
19 matter, like all others, will be considered without
20 fear, without favor, and that a rational and calm
21 historical judgment will be granted by this Tribunal
22 on this question. The Indictment served on the defend-
23 ants on the 29th and 30th of April indicate, as war
24 crimes, falling under the classification of "Crimes
25 Against Peace," those who have participated in common

1 plans, or who have formulated common plans or carried
2 out such plans. In other words, I am referring to counts
3 1 to 26 in the Indictment. I ask that these counts be
4 removed from the charges as being outside of the authority
5 of this Court. The same Indictment and classification,
6 "Crimes Against Humanity," mentioned the abuse of
7 narcotic drugs as in violation of the protocol on this
8 subject. In other words, these fall under counts 53 to
9 55 in the said Indictment as well as Appendix B. The
10 Indictment also charges, simply as "Murder," the destruc-
11 tion of lives, which took place at the time of the out-
12 break of the war as well as when war or battles were
13 actually in progress.

14 MONITOR: The destruction of lives of soldiers
15 and noncombatants.

16 DR. KIYOSE (Continuing): In other words,
17 these fall under counts 37 to 52 in the Indictment. It
18 is also asked, for the reasons already mentioned, that
19 these counts also be removed from the Indictment.

20 MONITOR: Without necessitating the present-
21 ation of evidence.

22 DR. KIYOSE (Continuing): The point I have
23 just mentioned is the first point objecting to this
24 Tribunal on the question of jurisdiction.

25 Next, I should like to explain, briefly, the

1 second point in the defenses objection. The Potsdam
2 Declaration of July 26th, accepted by Japan, was a
3 declaration issued and accepted for the purpose of
4 bringing to an end the war then existing between the
5 Allies and Japan, a war which in Japan was called "The
6 War of Greater East Asia." War crimes must, therefore,
7 be confined to the war then existing between Japan and
8 the Allies, what we call "The War of Greater East Asia"
9 and what the Allies have called "The Pacific War." It
10 is absolutely unthinkable that incidents which are
11 totally unrelated to the War of Greater East Asia, or
12 the Pacific War, or incidents which have been already
13 settled in the past, should be brought within the pur-
14 view of this trial.

15 One fact which we are hard put to understand
16 is the inclusion of the charge relative to Liaoning,
17 Kirin, Heilungkiang, and Jehol in the Indictment.

18 The Manchurian Incident is called an undeclar-
19 ed war. But, as a result of this Incident, the State of
20 Manchukuo was established and duly recognized by a number
21 of countries. The Honorable Judge representing the Soviet
22 Union is sitting in this Tribunal. The Union of Soviet
23 Socialist Republics has recognized Manchukuo. The
24 Chinese Eastern Railway was bought from the Soviet Union
25 by the State of Manchukuo. In other words, unless one

1 country recognizes the other, such a negotiation cannot
2 be considered. Therefore, it is our understanding that
3 the Soviet Union at that time had recognized the exist-
4 ence of the State of Manchukuo.

5 The incidents relative to Liaoning, Kirin,
6 Heilungkiang, and Jehol are incidents of the past which
7 belong to history and, therefore, are outside of the pur-
8 view of this trial. However, count 2 of the Indictment
9 has gone back to these past incidents and has been used
10 as charges against the defendants. What surprises us,
11 to a very great extent, are the incidents at Lake Khasan
12 and the incidents of the Kholhin Gol River between Japan
13 and the Soviet Union. The first incident, namely, the
14 Lake Khasan Incident, is referred to in our country as
15 the Chankufeng Incident; the second is the Nomonhan
16 Incident. These incidents are included in the charges
17 made in the Indictment. The Honorable Judge from the
18 Soviet Union being here, it is hardly necessary to pre-
19 sent any evidence; but the Lake Khasan Incident or the
20 Chankufeng Incident was settled through agreement which
21 was concluded in August, 1938.

22 MR. KEENAN: Just a moment. I wish to be
23 heard for the purpose of an objection at this time.

24 Mr. President, I, as chief of the prosecution,
25 rise for the purpose of interposing a basic objection to

1 this type of argument as is now being pursued for a
2 reason which I should like to be given permission to
3 succinctly state. May I be heard for a moment?

4 THE PRESIDENT: Briefly, yes.

5 MR. KEENAN: Briefly, my point is that the
6 prosecution objects to the discussion at this time of
7 any matters other than those of law and facts, as they
8 now appear before the Court, either in proof as provided
9 by the rules, or such of which the Court would take
10 judicial notice. I suggest, with great respect, Mr.
11 President, to this Court, that it is obvious that this
12 defense counsel is now proceeding to discuss matters of
13 law concerned with facts which are not before this Court
14 properly at this time by any consideration, either of
15 taking judicial notice or by any evidence preceding these
16 remarks and, therefore, with great respect and with defer-
17 ence to counsel, that this presentation is now premature
18 for such reason. Therefore, I ask the Court to direct
19 Counsel to concern his arguments only with law, or only
20 with such matters as are in evidence at the present time,
21 or of which the Court has stated it would take judicial
22 notice.

23 THE PRESIDENT: Counsel must remember that he
24 is dealing with a question of jurisdiction that is not
25 necessarily purely a question of law; but, so far as it

1 is based on facts, it must be on uncontested facts at
2 this time.

3 DR. KIYOSE: I understand. I am not attempt-
4 ing here, Mr. President, to try to produce evidence; I
5 am speaking only of facts. I beg the Court to listen to
6 the argument as a whole.

7 I have just spoken of the incident at Lake
8 Khasan for which settlement was reached. The second
9 incident, namely, the incident at the Kholhin Gol River,
10 was also brought to a settlement by an agreement arrived
11 at between Japan and the Soviet Union in September, 1939.

12 MR. KEENAN: Just a moment.

13 DR. KIYOSE (Continuing): Since then, a
14 neutrality pact was concluded between Japan and the
15 Soviet Union on July 26th. When the Declaration was
16 issued, Japan and the United States were in a state of
17 war, but Japan and the Soviet Union were not in a state
18 of war.

19 MR. KEENAN: Mr. President, the representative
20 of the Soviet Union denies the statement of fact, as made
21 by the learned counsel for the defense, with reference to
22 agreements concerning Lake Khasan, and we think that
23 should be reasonably brought to this Court's attention.

24 THE PRESIDENT: Subject to what my colleagues
25 think, I do not think that is a matter of which we can

1 take judicial notice.

2 MR. KEENAN: Since, Mr. President, the facts
3 are not uncontested with reference to this incident, and
4 since, Mr. President, the ruling has been made that such
5 comment is improper, I ask that those remarks concerning
6 Lake Khasan be stricken from this record.

7 THE PRESIDENT: The remarks relating to that
8 matter will be stricken from the record.

9 DR. KIYOSE: Mr. President, I ask that oppor-
10 tunity be given this counsel to produce evidence at the
11 next stage of this trial.

12 THE PRESIDENT: I understand that already.
13 We are taking evidence on the 3d of June, and thereafter,
14 and points of jurisdiction might well be based on the
15 evidence taken later.

16 DR. KIYOSE: Then, continuing my presentation,
17 I should like to proceed to point 3 with which I should
18 like to deal as simply as possible.

19 As I have pointed out before, the jurisdiction
20 of this Tribunal is limited to the war which was brought
21 to a close between Japan and the allies in accordance
22 with the Declaration of 26 July, 1945.

23 I should like to make a correction before I
24 proceed to the third point which I have just started. I
25 should like to go back to my second point, and beg the

1 Court to strike out from the Indictment counts 25, 26,
2 35, 36, 51 and 52. I shall now return to point 3.

3 THE PRESIDENT: That is a formal application
4 that he overlooked.

5 DR. KIYOSE: That is mentioned in the formal
6 application filed with this Court.

7 At that time there was no state of war exist-
8 ing between our country and Thailand, otherwise known
9 as Siam. As a matter of fact, Thailand and Japan were
10 allies. Under no circumstances could we ever imagine
11 that any war crimes were committed against this country,
12 this allied country of Thailand. Presuming, for the sake
13 of argument, that as a result of some differences a state
14 of war existed between Japan and Thailand, Thailand was
15 not or is not an Allied country. For that reason it is
16 not within the jurisdiction of this Court to try what
17 are called "war crimes" committed against Thailand.

18 The surprising point is that counts 4, 16, 24,
19 and 34 in the Indictment state that Japan had committed
20 war crimes against Thailand, and by those defendants
21 here who, at that time, were in Tokyo. These counts just
22 referred to are outside of the authority of this Tribunal.
23 Therefore, I ask that, without taking evidence, these
24 counts be removed from the Indictment. It is the sin-
25 cere request of this counsel that, after careful and due

1 deliberation of the three points which I have just set
2 forth, the Tribunal take just and fair action, and,
3 before proceeding with the trial, that these points
4 be considered seriously.

5 THE PRESIDENT: The Court will now recess
6 for ten minutes.

7 (Whereupon, at 1107, a recess
8 was taken until 1125 after which the pro-
9 ceedings were resumed as follows, English
10 to Japanese and Japanese to English inter-
11 pretations being made by OKA, Takashi of
12 statements from the floor, English to Japan-
13 ese interpretation being made by TSUCHIYA,
14 Jun of statements by the President, and
15 Hidekazu Hayashi acting as Monitor:)

16 MARSHAL OF THE COURT: The Tribunal is now
17 resumed.

18 CAPTAIN FURNESS: The American counsel for
19 the defense now present the supplemental motion to the
20 jurisdiction.

21 THE PRESIDENT: Well, I thought we would
22 take the arguments on each motion separately.

23 CAPTAIN FURNESS: Very good, sir.

24 THE PRESIDENT: If Dr. KIYOSE has completed
25 his argument, we will now hear the Chief Prosecutor.

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1 MR. KEENAN: Mr. President, Members of this
2 International Military Tribunal, can it be that eleven
3 nations represented on this Tribunal and in this pros-
4 ecution, and in themselves representative of orderly
5 governments, of countries containing one-half to two-
6 thirds of the inhabitants of this earth, having suffer-
7 ed through this aggression the loss of a vast amount
8 of their resources and deplorable and incalculable
9 quantities of blood due to the crimes of murder,
10 brigandage and plunder, are now totally impotent to
11 bring to trial and punish those responsible for this
12 world-wide calamity; that these Allied Nations, having
13 brought about, as they were compelled to so do by
14 sheer force, the end of these wars of aggression,
15 must now stand idly by and permit the perpetrators
16 of these offenses to remain without the reach of any
17 lawful punishment whatsoever?

18 THE PRESIDENT: Mr. Chief Prosecutor, do
19 you think those rhetorical phrases are fitting at this
20 juncture?

21 MR. KEENAN: Mr. President, in answer to that
22 remark from the President of this Tribunal, I regard
23 the motions as being addressed to the body public of
24 the world, as they are being published, and I do not
25 desire and had not desired to let them go entirely

1 unchallenged and am ready now, after this statement of
2 our proposition of the soundness of the prosecution,
3 to proceed to the analysis of the points raised.

4 The motion of the accused attempts to re-
5 strict the jurisdiction of this Court by accused's
6 construction of the language set forth in the Potsdam
7 Declaration, that "stern justice shall be meted out to
8 all war criminals, including those who have visited
9 cruelties upon our prisoners." In the motion there
10 are other assertions or implications that the surrender
11 of Japan was subject to certain conditions in this re-
12 spect. With this latter contention we have no concern
13 in the consideration of this motion, perhaps, purely
14 as a matter of law. But, I do not intend, in this
15 Tribunal, to permit that false assertion to remain un-
16 challenged, and I wish to state, as the position of
17 this prosecution, that the surrender of the Japanese
18 nation was utterly and entirely without conditions
19 and that recourse to the Instrument of Surrender and
20 the documents leading thereto will so demonstrate.

21 Examination of the two Japanese communica-
22 tions already identified in this case, transmitted to
23 the various Allied governments through the Swiss
24 Government at the time of the surrender, will show
25 that the surrender of the Japanese Government was

1 without condition.

2 An attempt is also made to limit the author-
3 ity of this Court through a construction of the
4 Proclamation which was issued by the Supreme Commander
5 for the Allied Powers when the Charter establishing
6 the Court was promulgated. These observations made by
7 the accused in this motion likewise are shown to be
8 erroneous, since the very first paragraph of the said
9 Proclamation states:

10 "WHEREAS, the United States and the Nations
11 allied therewith in opposing the illegal wars of ag-
12 gression of the Axis Nations, have from time to time
13 made declarations of their intentions that war crimin-
14 als should be brought to justice."

15 The accused impugn the Charter and, in
16 effect, declare it to be ultra vires -- beyond the
17 power of the Supreme Allied Commander to proclaim.

18 That is in respect to the matters referred
19 to in their motion.

20 But, both the Special Proclamation herein-
21 before referred to and the Instrument of Surrender
22 show with abundant clarity that the Supreme Commander
23 for the Allied Powers "is authorized to take such
24 steps as he deems proper to effectuate the terms of
25 surrender."

1 There are other terms of the Proclamation
2 showing the falsity of the concept set forth in the
3 motion of the accused which we deem it now not neces-
4 sary to indicate to this Tribunal.

5 Reference has been made, as the real basis
6 of this motion, to the construction to be given to
7 the term "war criminals" with reference to the lan-
8 guage of the Potsdam Declaration. Paragraph 6 is
9 respectfully called to this Court's attention.

10 "There must be eliminated for all time the
11 authority and influence of those who have deceived and
12 misled the people of Japan into embarking on world
13 conquest, for we insist that a new order of peace,
14 security and justice will be impossible until ir-
15 responsible militarism is driven from the world."

16 Paragraph 13 of the Potsdam Declaration
17 reads as follows:

18 "We call upon the government of Japan to
19 proclaim now the unconditional surrender of" the
20 Japanese people--"

21 DR. KIYOSE: What people?

22 MR. KEENAN: Correction: "of all Japanese
23 armed forces, and to provide proper and adequate
24 assurances of their good faith in such action. The
25 alternative for Japan is prompt and utter destruction."

1 Paragraph 2 of the Instrument of Surrender
2 states:

3 "We hereby proclaim the unconditional sur-
4 render to the Allied Powers of the Japanese Imperial
5 General Headquarters and of all Japanese armed forces
6 and all armed forces under Japanese control wherever
7 situated."

8 The third paragraph of this Instrument reads:

9 "We hereby command all Japanese forces
10 wherever situated and the Japanese people to cease
11 hostilities forthwith, * * * and to comply with all
12 requirements which may be imposed by the Supreme Com-
13 mander for the Allied Powers or by agencies of the
14 Japanese Government at his direction."

15 The fifth paragraph of the Instrument pro-
16 vides:

17 "We hereby command all civil, military and
18 naval officials to obey and enforce all proclamations,
19 orders and directives deemed by the Supreme Commander
20 for the Allied Powers to be proper to effectuate this
21 surrender. * * *."

22 I respectfully call the Tribunal's attention
23 to the fact that the Charter contested in this motion
24 is one of these orders, originally General Order No. 1
25 and now, I believe, General Order No. 20. It is

1 unnecessary to add that the Charter defines the crimes
2 which accused deny now to exist as such. Indeed, it
3 might be agreed that there was in this respect a vast
4 difference between the capitulation of Japan and of
5 Germany and that all of these things were agreed to
6 by the duly constituted Government of the Japanese
7 nation, including a great number of the accused them-
8 selves.

9 The sixth paragraph of the Instrument of
10 Surrender states:

11 "We hereby undertake for the Emperor, the
12 Japanese Government and their successors to carry out
13 the provisions of the Potsdam Declaration in good
14 faith, and to issue whatever orders and take whatever
15 action may be required by the Supreme Commander for
16 the Allied Powers or by any other designated repre-
17 sentative of the Allied Powers for the purpose of
18 giving effect to that Declaration."

19 The last paragraph of the Instrument of
20 Surrender states:

21 "The authority of the Emperor and the
22 Japanese Government to rule the state shall be sub-
23 ject to the Supreme Commander for the Allied Powers
24 who will take such steps as he deems proper to effec-
25 tuate these terms of surrender."

1 It is important then, in any proceeding
2 relating to the interpretation of the Terms of
3 Surrender, and such has already been injected into
4 this case by this motion, emphatically to reject any
5 false claim that this surrender instrument was condi-
6 tional. I hope it will not be offensive to any Member
7 of this Tribunal to give the concept of the chief of
8 the prosecution as to the basis of this motion, the
9 heart of it, in language which may be descriptive but
10 which relates to important facts that shook the founda-
11 tion of the world and may well cause its utter de-
12 struction unless the proceedings in behalf of the
13 preservation of peace are brought forward to success-
14 ful completion.

15 The precise legal proposition presented to
16 this Court constitutes -- and I say, "the precise
17 legal proposition" presented to this Court presents a
18 clear challenge to the capacity of civilized nations
19 to take effective preventive steps to save civiliza-
20 tion by punishing the responsible individuals who
21 brought about the scourge of aggressive warfare over a
22 great part of the earth. It amounts to a claim that
23 treaties, obligations and assurances solemnly entered
24 into by a nation, through its duly constituted author-
25 ities, have no real significance. The bold proposition

1 is presented by the proponents of this motion that
2 individuals proved to have set in motion and directed
3 forces bringing about ruthless and unjustified wars
4 threatening the existence of civilization are, by
5 reason of high official positions of responsibility
6 which they held, immune from any punishment for such
7 acts.

8 This is tantamount to a claim that a person,
9 or group of persons acting in concert, may scatter
10 gasoline and gunpowder throughout a building filled
11 with human beings, stuff the closets with oil-soaked
12 rags, pile tinder against the doors, nail the windows
13 shut so that the occupants cannot escape, and then,
14 having handed a torch already lighted by them to ir-
15 responsible and helpless individuals under their
16 domination and control, can order it to be applied,
17 all with impunity.

18 This may be an analogy not appealing to
19 those steeped in the mustiness of legal sterilisms re-
20 ferred to sometime back; but this analogy will be
21 understood, Mr. President, by those who bear the real
22 suffering when war comes upon mankind and who have a
23 right to be heard in some attempt to prevent its repe-
24 tition, for the proponents of these motions claim in
25 the analogy suggested that these leaders, directors

1 and officials, having obtained the power to bring this
2 ruin about -- having planned, prepared and initiated
3 it -- can never be brought to the bar of justice.

4 The necessary corollary follows that the
5 helpless dupes and victims who were subject to their
6 control and orders and the orders of these leaders, as
7 well as the millions of other innocent individuals, may
8 undergo untold suffering for these acts while these
9 leaders remain free from punishment.

10 THE PRESIDENT: We will now recess until
11 thirty minutes after one o'clock.

12 (Whereupon, at 1201, an adjourn-
13 ment was taken until 1330, after which the
14 proceedings were resumed as follows:)

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AFTERNOON SESSION

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The Tribunal met, pursuant to recess, at 1330.

MARSHAL OF THE COURT: The Tribunal is now resumed.

THE PRESIDENT: Mr. Chief Prosecutor.

MR. KEENAN: Before recess, we were discussing the necessary corollary follows that the helpless dupes and victims who were subject to the control and orders of these leaders, as well as millions of other innocent individuals, may undergo untold suffering for these acts while these leaders remain free from punishment. And this is said to be the law. Such a contention is as revolting as it is unsound.

And the broader point is raised by the accused's motion, whether mankind will place itself in a straightjacket of legal precepts (which are without foundation or logic) by bowing to the force of such worm-wood legalisms, and leave these responsible criminals unpunished and at large? And is it supposed that in the meantime organized society must remain supinely quiescent, with the soft folded hands of indifference, and await its own destruction in a very literal sense?

1 It is tantamount to the assertion that mankind is
2 without lawful power to save itself.

3 The motion sets forth the very narrow
4 legal contention that "according to the general con-
5 ception prevailing in July, 1945 "war criminals"
6 meant those who violated rules and customs of war
7 after the commencement of war and to be punished
8 according to the previous international law and
9 customs." This proposition is said to be sustained
10 by international law, and by what these Japanese
11 accused had a fair right to understand was the mean-
12 ing of the term "war criminals" as employed as late
13 as 26 July, 1945.

14 We would point out to the Court that the
15 accused conveniently omit some very important and
16 relevant and, we contend determinative, statements
17 and declarations addressed to this very subject. We
18 shall proceed to outline some of them.

19 In 1919 the signatories to the Treaty of
20 Versailles, including Japan, made provision for the
21 trial of William II "for a supreme offense against
22 international morality and the sanctity of treaty."

23 In 1920 the members of the League of
24 Nations, including Japan, agreed that a war entered
25 upon in violation of the Covenant providing for

1 peaceful settlement should be regarded as an act of
2 war against all of the members of the League. A war
3 in violation of the Covenant thus became an illegal
4 war, and any acts of violence accompanying it should be
5 described as crimes against the international community.

6 The Geneva Protocol for the Pacific Settlement
7 of International Disputes, signed by the representatives
8 of forty-eight nations, specifically provided: "A war of
9 aggression constitutes an international crime." This was
10 followed in the Eighth Assembly of the League of Nations
11 in 1927 by a unanimous resolution in almost the same
12 language. Japan was a signatory of both of these instru-
13 ments.

14 The Sixth Pan-American Conference of 1928
15 adopted a resolution on aggression, the preamble of which
16 specifically states "that war of aggression constitutes
17 an international crime against the human species."

18 Now, accused counsel seem to contend that these
19 proceedings of the Pan-American Conference had no force
20 or effect upon this Tribunal or upon precedent, but with
21 great respect we urge that they clearly set forth, as
22 early as that date, in an important part of the hemisphere
23 the assertion that aggressive warfare constituted crimes
24 was well established, and the world was given notice of
25 such view and opinion; and it is interesting to note

1 that as early as 1907 in the Hague Convention, entitled
2 "Convention Respecting the Laws and Customs of War on
3 Land," we find the following paragraph:

4 "Until a more complete code of laws of war had
5 been issued, the high contracting parties deem it ex-
6 pedient to declare that in cases not included in the
7 regulations adopted by them, the inhabitants and the
8 belligerents remain under the protection and rule of
9 the principle of the law of nations" -- and I would
10 emphasize this with great respect to this Tribunal and
11 the learned counsel for the accused. Continuing the quo-
12 tation: "* * * * that until a more complete code of
13 laws of war has been issued, the inhabitants and
14 belligerents remain under the protection and rules of the
15 principles of the law of nations as they result from the
16 usages established among civilized peoples, and from the
17 laws of humanity and the dictates of the public conscience."

18 And it is further interesting to note that this
19 pronouncement and agreement was subscribed to in the name
20 of and on behalf of the Emperor of Japan and the Japanese
21 nation.

22 By the very important Kellogg-Briand Pact,
23 signed in Paris August 27, 1928, the Contracting Parties
24 (that is, practically the whole community of the civilized
25 world, including Japan), after solemnly declaring "in the

1 name of their respective peoples" that they condemned re-
 2 course to war for the solution of international controver-
 3 sies, renounced war as an instrument of national policy in
 4 their relations with one another. Although the text of
 5 this Pact does not use the word "crime," it is clear that
 6 the Contracting Parties, by the fact of renouncing war "as
 7 an instrument of national policy," meant to put the system
 8 of aggressive warfare outside the law, that is, to make it
 9 illegal. It is, of course, of no import to make acts done
 10 by individuals illegal unless such individuals come within
 11 the classification of law breakers or even criminals, as
 12 the case may be.

13 It is evident, then, that by 1928 all the civilized
 14 nations in the world, by solemn commitments and agreements,
 15 recognized and pronounced wars of aggression to be inter-
 16 national crimes, and thus established the illegality of
 17 war as a positive rule of international law. To this exist-
 18 ing obligation not to wage an illegal war in violation of
 19 a positive rule of international law, there was a super-
 20 imposed contractual obligation not to wage war in violation
 21 of specific treaties. We hope that neither in points
 22 asserted in support of this motion nor any other time dur-
 23 ing this proceeding there will be the claim made by anyone
 24 that treaties have no significance.

25 What is the meaning of the term "war criminals"

1 as understood at the time of the Potsdam Declaration and
2 at the time of this surrender?

3 On November 1, 1943 there was issued at Moscow
4 an historic declaration by President Roosevelt, Prime
5 Minister Churchill and Marshal Stalin on behalf of their
6 respective governments, wherein a clear-cut line of dis-
7 tinction was drawn between war criminals, charged with
8 having been responsible for or having taken part in
9 atrocities, massacres and the execution of prisoners of
10 war or civilian populations, and what were termed for con-
11 venience major war criminals, "whose offenses have no
12 particular geographical location and who will be punished
13 by the joint decision of the Government of the Allies."

14 On November 6, 1942, at a meeting of the Moscow
15 Soviet on the 25th anniversary of the Revolution, Marshal
16 Stalin announced that one of the objectives of the war
17 was "to destroy the hated New Order in Europe and to
18 punish those who established it."

19 A year later on the next anniversary, the same
20 authority publicly reiterated the intention to punish all
21 war criminals, including those responsible for the war.
22 At that time Stalin told the Russian people and the world:
23 "Together with our allies we shall take measures that all
24 the Fascist criminals responsible for the present war and
25 the sufferings of peoples in whatever country they may hide

1 themselves will get severe punishment and retribution for
2 all their crimes."

3 I hope, Mr. President, that I may be permitted
4 to make some reference to these accused in strong language
5 since the references come from the lips of the late
6 President Roosevelt, who contributed so much towards the
7 termination of this human slaughter of aggressive warfare
8 and who gave his life in such effort and who insisted, in
9 effect, that men of the type of these very accused be
10 brought before a tribunal of this nature; that they should
11 be sternly punished for their offenses.

12 I shall proceed, with the Court's permission,
13 with a few quotations from him.

14 THE PRESIDENT: How far will those quotations
15 help us to determine what is purely a question of
16 jurisdiction?

17 MR. KEENAN: They will help us, if the Court
18 please, since one of the points raised in this motion is
19 that these accused and the Japanese people had a right to
20 believe that under the terms of the surrender they were
21 not to be brought before a tribunal of this nature to
22 answer for the crimes of aggressive warfare.

23 I propose to show by his statements that went
24 all over the world--and doubtless, Mr. President, you may
25 have heard them--that direct warning was given and direct

1 notice, so that any claim that the Japanese people were
2 deceived or these defendants, or that there was not a
3 clear understanding of what the purpose was, is not
4 tenable, and it is a legitimate part of the prosecution
5 to refuse that false position.

6 THE PRESIDENT: How far will these statements
7 by President Roosevelt and Marshal Stalin relate to the
8 Potsdam Declaration, or any other document like that, that
9 we may consider?

10 MR. KEENAN: I know of no better way to answer
11 you, Mr. President, than to quote to you from the Procla-
12 mation which created this Court upon which you sit. And I
13 shall now, with your permission, read it.

14 "WHEREAS, the United States and the Nations
15 allied therewith in opposing the illegal wars of aggression
16 of the Axis Nations, have from time to time made declarations
17 of their intentions that war criminals should be brought
18 to justice."

19 So that, if there is no further objection, I
20 would like to advert briefly to these statements to which
21 the Supreme Allied Commander, representing the Powers in
22 creating this Court, himself referred at the time of the
23 Proclamation establishing this Court and at the time you
24 were appointed as President by him.

25 May I proceed?

1 THE PRESIDENT: We trust you to avoid anything
2 in the nature of inflammatory statements.

3 MR. KEENAN: I will choose the language of
4 President Roosevelt as he chose to use it over a world-
5 wide radio. And I will trust myself to be within the
6 confines of decency and good conduct in following his
7 example.

8 THE PRESIDENT: Your duty is to argue on the
9 question of jurisdiction and not to attempt to prejudice
10 us. My duty is to protect this Court.

11 MR. KEENAN: I would think there would be no
12 difficulty in the Court being protected from any attempt
13 to prejudice it.

14 I would like to proceed to read relevant comments
15 referred to in the Proclamation, if the Court will permit
16 me.

17 If the Court please, there is so much the
18 prosecution depends upon in bringing notice of these
19 statements in answering this motion that I should like
20 to have a ruling from the Court as to whether or not I may
21 proceed to advert briefly to these remarks of President
22 Roosevelt.

23 THE PRESIDENT: I am endeavoring to ascertain
24 the opinion of the Court.

25 The Court thinks you should be allowed to quote

1 those remarks of President Roosevelt.

2 MR. KEENAN: On February 12, 1943, President
3 Roosevelt in his important address on the birthday of
4 the Great Emancipator, Lincoln, clearly enunciated that:
5 "To these penicky attempts to escape the consequences
6 of their crimes we say -- all the United Nations say --
7 that the only terms on which we shall deal with an Axis
8 government or any Axis factions are the terms proclaimed
9 at Casablanca: 'Unconditional Surrender.' In our
10 uncompromising policy we mean no harm to the common
11 people of the Axis nations. But we do mean to impose
12 punishment and retribution in full upon their guilty
13 and barbaric leaders."

14 And as far back as October 12, 1942, Presi-
15 dent Roosevelt, the same President Roosevelt, in a
16 radio broadcast to the American nation which was heard
17 all over the world, emphatically declared that "We have
18 made it entirely clear that the United Nations seek no
19 mass reprisals against the populations of Germany or
20 Italy or Japan. But the ringleaders and their brutal
21 henchmen must be named, and apprehended, and tried in
22 accordance with the judicial processes of criminal law."

23 And I take it for granted that one would have
24 little patience with the denial that these accused, or
25 any of them, would have any difficulty in ascertaining the
meaning of the words "ringleaders and brutal henchmen."

1 The date of that, if it please the Court, was almost three
2 years before either Potsdam or the date of the signing of
3 the Instrument of Surrender.

4 In the Cairo Conference -- the language to which
5 I will advert briefly, and I am sure there will be no ob-
6 jection to that because the Court designated it as one of
7 the instruments to be identified -- the following is found:
8 1 December, 1943, the United States of America through
9 President Roosevelt, the Republic of China through Gener-
10 alissimo Chiang Kai-Shek, and the United Kingdom through
11 its Prime Minister Churchill, declared: "The several mil-
12 itary missions have agreed upon future military operations
13 against Japan. The three Great Allies expressed their
14 resolve to bring unrelenting pressure against their
15 brutal enemies by sea, land, and air. This pressure is
16 already rising * * *. The three Great Allies are fight-
17 ing this war to restrain and punish the aggression of Japan."

18 What is the fair meaning of this stern warning,
19 "to restrain and punish the aggression of Japan"? Do the
20 accused contend that such punishment should be related only
21 to those helpless and unfortunate among the Japanese people
22 who had no part in bringing about these wars of aggression,
23 and who, as we believe, were themselves dupes and victims
24 of these very accused; to those Japanese whose lives were
25 sacrificed in figures running into the millions, and whose

1 cities and harbors were smashed in a manner never before
2 known in history; to those who are now left the bitter
3 and difficult road to rehabilitation?

4 Did the Allied leaders refer to these people
5 in this stern warning? Did our leaders intend that a
6 benevolent and kindly immunity was to be extended to the
7 plotters, the planners and the dictators of this world
8 holocaust? This is a queer sort of reasoning -- one that
9 we believe would be difficult not alone to impress upon
10 this Court, but upon the peoples of all nations, including
11 those of Japan.

12 But if there is any ambiguity upon the point,
13 it seems to me it is clearly resolved by the paragraph
14 that I am now about to read from the Potsdam Declaration,
15 wherein the intentions of the Powers were set forth,
16 proclaimed by heads of the Governments of the United
17 States, the United Kingdom, and China, and later adopted
18 by the Union of Soviet Socialist Republics. I refer now
19 to paragraph 10, from which I will quote:

20 "We do not intend that the Japanese shall be
21 enslaved as a race or destroyed as a nation, but stern
22 justice shall be meted out to all war criminals, including
23 those who have visited cruelties upon our prisoners." This,
24 together with paragraph 8 of the said Declaration, providing:
25 "The terms of the Cairo Declaration shall be carried out,"
incorporating, of course, that part of the Cairo Declaration

1 which stated: "The three Great Allies are fighting this
2 war to restrain and punish the aggression of Japan," shows
3 clearly that all of these accused were put upon notice, as
4 was the entire Japanese nation, of the exact purposes of the
5 Allies, and emphasizes that stern justice would be meted
6 out to those guilty of planning, initiating and waging
7 these aggressive wars -- the same stern justice that is
8 awarded to common felons.

9 May I ask the Court now to hear from my dis-
10 tinguished associate, Mr. Comyns Carr, representative of
11 the United Kingdom, who will address the Court on a different
12 aspect of this same subject matter for the prosecution?

13 THE PRESIDENT: We will hear Mr. Comyns Carr.

14 MR. COMYNS CARR: May it please the Tribunal, I
15 have written out the major part of my argument, and it has
16 been translated into Japanese and a copy provided for the
17 interpreters. Therefore, subject to the approval of the
18 Tribunal and with their concurrence, if I may say so, I
19 propose to read it in English as a whole and then let the
20 interpretation be read as a whole. After that, there are
21 one or two observations arising out of the argument presented
22 this morning which I should like to add, with the permission
23 of the Tribunal, have not been translated in advance and
24 will have to be translated in the ordinary way.

25 THE PRESIDENT: That will be permitted.

1 MR. COMYNS CARR: This motion does not pur-
2 port to attack the whole jurisdiction of the Tribunal,
3 but is in effect an attempt to strike out certain counts
4 of the Indictment and an attack upon certain parts of the
5 Charter. It is based entirely upon an attempt to con-
6 strue in a narrow way certain phrases in the Potsdam
7 Declaration and the Instrument of Surrender. It can
8 quite easily be disposed of on this basis, but we de-
9 sire to point out two objections to this method of ap-
10 proach.

11 The first is that as appears from the open-
12 ing paragraph of the special Proclamation establishing
13 this Tribunal, the right of the Allied Nations to bring
14 war criminals to justice is not based solely upon the
15 assent of the Japanese Government by the Instrument of
16 Surrender to the terms of the Potsdam Declaration and
17 other documents incorporated therewith. On the con-
18 trary, any nation or group of nations has an inherent
19 right to bring war criminals to justice whenever and
20 wherever they have the opportunity to do so, unless
21 they have by treaty debarred themselves from that
22 right. This principle has been many times laid down
23 and is well summarized in the following passage from
24 Stowell's "International Law," published in 1931,
25 at pages 597 to 8:

1 "The states assembled in a general conclave
2 possess all the powers of international law, just as
3 formerly the assembly of the tribe had plenary powers
4 of legislation, judication, and administration. Gener-
5 ally and normally the punishment of the individual
6 would, as has been said, be left to the state of the
7 offender, and in the event of its delinquency or fail-
8 ure to apply the law, a state acting vicariously would
9 then apply the same penal provisions. In extraordi-
10 nary cases, however, when it is necessary to safe-
11 guard international society from the disgrace and the
12 dangers of unpunished crimes against the peace of na-
13 tions, the states in conference may post hoc (after
14 the act) define the offence, organize the judicature,
15 and enforce submission to the judgment. But in such
16 a proceeding it is always to be remembered that inter-
17 national law guarantees to every individual a minimum
18 of security, and requires that he be not tried, con-
19 victed, and punished without enjoying the due process
20 of law."

21 The second objection is that although the
22 Potsdam Declaration laid down certain terms in the
23 form of statements as to the intentions of the Allies,
24 it ended in paragraph 13 by demanding the unconditional
25 surrender of all Japanese armed forces.

1 An attempt by the Japanese Government to in-
2 troduce a condition in the communication forwarded by
3 the Swiss Charges d'Affaires on August 10, 1945, was
4 promptly rejected on August 11 and in the Instrument
5 of Surrender itself the Japanese Government in terms
6 proclaimed unconditional surrender. The statements
7 of intention in the Potsdam Declaration and other doc-
8 uments are being and will be fully carried out, but
9 they cannot in our submission give any rights to these
10 defendants or enable them to found any attack upon
11 the Charter.

12 Coming now to deal with the first point in
13 the motion, on the basis of the Potsdam Declaration,
14 it appears that the motion is founded upon an attempt
15 to give to the words "War Criminals" in paragraph 10,
16 a narrow meaning restricting it to what are described
17 in the Charter in Article 5(b) as "Conventional War
18 Crimes." It is obvious, however, that paragraph 10
19 of the Potsdam Declaration does not purport to con-
20 tain a full definition of "War Criminals," but leaves
21 that, as it leaves many other matters, to be amplified
22 by subsequent orders of the Supreme Commander acting on
23 behalf of the Allied Powers. This is made clear in the
24 third paragraph of the letter of August 11, 1945:
25 "from the moment of surrender the authority of the

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1 Emperor and the Japanese Government to rule the state
2 shall be subject to the Supreme Commander of the Allied
3 Powers, who will take such steps as he deems proper to
4 effectuate the surrender terms." This sentence is re-
5 peated verbatim in the last paragraph of the Instrument
6 of Surrender itself. Nevertheless Paragraph 10 of the
7 Potsdam Declaration, when the appropriate words are
8 read in full: "stern justice shall be meted out to
9 all war criminals including those who have visited
10 cruelties upon our prisoners," makes it clear that
11 crimes other than those described as "Conventional War
12 Crimes" are included.

13 The motion alleges that "according to the
14 general conception prevailing in July, 1945, 'war
15 criminals' meant those who violated rules and customs
16 of war after the commencement of war and to be punish-
17 able according to the previous international laws and
18 customs." There is no warrant whatever for this
19 statement or implication that the expression "war
20 criminals" as confined to this particular class. If
21 it was not clear before, the Treaty of Versailles by
22 Article 227 made it plain. It reads as follows:

23 "The Allied and Associated Powers publicly
24 arraign William II of Hohenzollern, formerly German
25 Emperor, for a supreme offence against international

1 morality and the sanctity of treaties.

2 "A special tribunal will be constituted to
3 try the accused, thereby assuring him the guarantees
4 essential to the right of defence. It will be com-
5 posed of five judges, one appointed by each of the
6 following Powers: namely, the United States of Amer-
7 ica, Great Britain, France, Italy and Japan.

8 "In its decision the tribunal will be guided
9 by the highest motives of international policy, with a
10 view to vindicating the solemn obligation of interna-
11 tional undertakings and the validity of international
12 morality. It will be its duty to fix the punishment
13 which it considers should be imposed.

14 "The Allied and Associated Powers will ad-
15 dress a request to the Government of the Netherlands
16 for the surrender to them of the ex-Emperor in order
17 that he may be put on trial."

18 This treaty was signed by twenty-eight
19 States including Japan as one of the principal victor-
20 ious Powers in the first World War, now one of the de-
21 feated, Italy another, Germany one of the nations then
22 and now defeated and the following Powers then and now
23 victorious and mentioned in this Indictment: The
24 United States of America (representing then also the
25 Commonwealth of the Philippines now separately

1 represented), the British Empire (including the Common-
2 wealth of Australia, Canada, New Zealand and India now
3 separately represented), France and China; also Portu-
4 gal and Siam referred to in this Indictment, and a num-
5 ber of other nations then and now among the victorious
6 Allies, but not represented here. It was ratified by
7 twenty-four of the above-mentioned twenty-eight States,
8 including Japan. It was not ratified by the United
9 States of America owing to the change of view which de-
10 veloped there with regard to the Covenant of the League
11 of Nations which formed Part I of the Treaty.

12 The trial of the Kaiser never took place ow-
13 ing to the fact that he had taken refuge in the Nether-
14 lands and there was no Treaty available for his extra-
15 dition from that country on the charges named.

16 The passage from Stowell, which I have al-
17 ready cited, continues as follows:

18 "The victorious allies, acting for inter-
19 national society, had a right to try the Kaiser, if
20 so minded, for his personal responsibility in the
21 events of August, 1914, but they would have had no
22 right to appoint a court of politicians and to refuse
23 him the production of such documents from their own
24 archives as he might require for his defense.

25 "In the present state of public opinion,"

1 it was written in 1931, "it is probably as well that
2 no attempt was made to carry out the provisions of the
3 treaty in regard to the trial of the Kaiser, but it is
4 necessary to preserve the principle of personal re-
5 sponsibility in order to protect society and to punish
6 offenses which cannot be defined in advance."

7 In this case, the question which caused some
8 controversy in the case of the Kaiser as to the pro-
9 priety of trying the head of a State does not arise.
10 The defendants whom we are bringing to trial are those
11 who, as we expect to prove, exercised in Japan the ef-
12 fective power to commit the crimes against peace which
13 we are charging. The principle was clearly laid down.
14 The precedent was established and acknowledged by so
15 many nations including Japan.

16 Even then, however, it was not, in principle,
17 new. As the motion itself admits, the right of a bel-
18 ligerent to try and punish offenders against the laws
19 and customs of war had long been universally recog-
20 nized. In reality, it is based simply upon a breach
21 of international law partly enshrined in treaties.
22 The principle is exactly the same when applied to
23 other breaches of international law and treaties such
24 as those covered by Article 5(a) of the Charter and
25 by the counts in Groups One and Two of this Indictment.

1 The only reason why the principle had not before 1919
2 been applied to breaches of international law other
3 than the laws and customs of war is that no clear
4 case of such breaches had arisen, and there were at
5 that time very few general treaties of the type, the
6 breach of which we now allege.

7 To take, as a particular example, the open-
8 ing of hostilities without a declaration of war or
9 ultimatum, this was dealt with by treaty for the first
10 time in the Third Hague Convention of 1907. Stowell,
11 at page 452, summarises the position as follows:

12 "Warning of Intention. International secur-
13 ity and respect for good faith require that the supposed-
14 ly friendly and mutually trustful relations of peace
15 should not be interrupted without a warning sufficient
16 to constitute due notice. This it would appear has
17 ever been the rule among all peoples. The fundamental
18 purpose of the rule is to prevent treachery and the
19 fear of it which would render peace of so precarious
20 a nature as to be almost worse than war. Among
21 primitive peoples generally and among European nations
22 until more recent times, recourse to war was always
23 preceded by a formal notice or declaration. But in
24 more recent wars there have been instances in which re-
25 course to hostilities occurred without a formal and prior
declaration.

1 "It was for lack of such express notice that
2 accusations were hurled at Japan in 1904 of having
3 treacherously begun her attack on the Russian fleet.
4 The merits of that particular controversy have been
5 discussed by jurists with acrimony and ability. Japan
6 herself recognized the desirability of avoiding the
7 likelihood of any similar controversy in the future,
8 and she therefore concurred in the adoption of The
9 Hague Convention (III) of October 18, 1907, relative
10 to the opening of hostilities, which in the preamble
11 stating its purpose declares that the signatory states:
12 'Considering that it is important, in order to ensure
13 the maintenance of Pacific relations, that hostilities
14 should not commence without previous warning;

15 "That it is equally important that the
16 existence of a state of war should be notified without
17 delay to neutral Powers;

18 "'Being desirous of concluding a Convention
19 to this effect, have appointed the following as their
20 plenipotentiaries: * * *'

21 "And in fulfilment of this statement of pur-
22 pose the Convention contains the following article:

23 "'Article I. The contracting powers recog-
24 nize that hostilities between themselves must not
25 commence without previous and explicit warning, in the

1 form either of a declaration of war, giving reasons,
2 or of an ultimatum with conditional declaration of
3 war."

4 The most important of the other treaties,
5 breaches of which are also alleged in Groups One and
6 Two of the Indictment, are treaties which were entered
7 into in or after 1907; many of them were entered into
8 after 1919.

9 The prosecution submits, therefore, that
10 Article 227 of the Treaty of Versailles was merely
11 giving effect to a principle already well established
12 although in relation to a new subject matter and that
13 the same principle which was applied then by Japan,
14 amongst other powers, to the responsibility of the
15 highest individuals for breaches of treaties then in
16 force, is equally applicable to breaches of treaties
17 which have come into force since that date.

18 The absurdity of the defendants' contention
19 is well illustrated when one notices that it is extend-
20 ed to cover an objection to the trial of "Crimes
21 Against Humanity" and of charges of "Murder" of com-
22 batants and non-combatants at the commencement of war
23 and during its execution. The Hague Convention IV of
24 1907 deals not only with crimes committed against
25 prisoners of war, but with crimes committed in the

1 course of hostilities and also with crimes committed
2 against the civilian population in occupied territories.
3 With regard to the charge of "Murder" in the initiation
4 of hostilities, this is probably not the occasion on
5 which to elaborate the argument which will be submitted
6 to the Court on this question. The basis of it is that
7 the crime of "Murder" lies in the intentional killing
8 of a human being without legal justification. Amongst
9 other legal justifications for such killing which might
10 exist is lawful belligerency, that is to say, the right
11 of a soldier to kill his enemy in the course of a law-
12 ful war, in a manner and under circumstances not for-
13 bidden by the laws of war. We shall contend when the
14 evidence has been given that in the cases charged, no
15 such justification existed; in some cases because hos-
16 tilities were commenced without warning, and therefore
17 the war and the belligerency was unlawful; in some
18 cases because they were in breach of other treaties
19 forbidding aggression, and therefore the war and the
20 belligerency was unlawful; in other cases because they
21 were contrary to the laws and customs of war which in-
22 clude unlawful conduct towards both combatants and non-
23 combatants.

24 There is no count in the Indictment charging
25 the use of opium and other narcotics as a war crime in

1 itself; it is only alleged as one of the means by which
2 unlawful wars were carried on.

3 To obtain convictions on those counts, we
4 shall have to deal with propositions both of law and
5 fact, but to suggest that this Tribunal has no juris-
6 diction to entertain charges of Murder, a jurisdiction
7 plainly conferred upon it by the Charter, and existing
8 in every civilized country in the world, is in our
9 submission, the height of absurdity.

10 The fact that a particular international
11 convention dealing with the law of war does not specify
12 that violations thereof are punishable, does not pre-
13 clude punishment for violations thereof which are war
14 crimes.

15 The practice of punishing war crimes had
16 been a part of customary law long before certain of the
17 laws were put into the form of treaties and conventions.
18 International conventions, from The Red Cross Conven-
19 tion of 1864 to The Geneva Convention of 1929 have not
20 contained provisions for the punishment of war crimes
21 committed in violation of their provisions. Nothing
22 could be clearer than that there was no intention to
23 depart from the pre-existing practice of punishing
24 violations when they amounted to war crimes.

25 The customary law prior to the first of

1 those conventions is set out in Lieber's General
2 Order 100 of 24 April 1863, paragraph 44: "All wanton
3 violence committed against persons in the invaded
4 country, all destruction of property not commanded by
5 the authorized officer, all robbery, all pillage or
6 sacking * * * all rape, wounding, maiming, or killing
7 of such inhabitants, are prohibited under the penalty
8 of death, or such other severe punishment as may seem
9 adequate for the gravity of the offense."

10 The practice of punishment has continued
11 down to the present time. Thousands of such cases
12 have been tried by military tribunals since the start
13 of the practice of stating the substantive law of war
14 in international conventions. In addition to the
15 thousands of military trials, the Leipzig trials are
16 familiar examples of trial and punishment for war
17 crimes committed in violation of the Hospital Ship
18 Convention of 1907 and The Hague Regulations, neither
19 of which expressly provided penal sanctions for viola-
20 tions of their terms.

21 In "In ex parte Quirin" (291 U.S.) Chief
22 Justice Stone accepts as established law that military
23 courts have power to inflict punishments on individuals
24 and that they have jurisdiction to give effect to of-
25 fenses specified in The Hague Convention and similar

1 offenses so as to give full scope to the governing
2 purposes.

3 It follows that the lack of any statement in
4 the treaties, on which we are relying and which are
5 set out in Appendix B, as to the legal consequences to
6 an individual responsible for their breach, is there-
7 fore of no significance. In our submission the con-
8 sequences of a breach of such treaties are exactly the
9 same as is shown by the established rule in the case
10 of those which deal with "Conventional War Crimes."
11 Those who break treaties, or the International Laws
12 which they amplify, are all equally war criminals and
13 punishable according to the gravity of their offense.

14 The Charter lays down that principle by
15 which this Tribunal is bound and, in doing so, follows
16 well known international law.

17 Point II in the motion falls into two parts.
18 Some of it I am going to read now may be un-
19 necessary in view of what the Tribunal decided this
20 morning, but it is short, and perhaps the Tribunal
21 will bear with me rather than put the interpreters out
22 by altering what I was going to say.

23 Point II in the motion falls into two parts.
24 The first is an assertion that the purpose of the
25 Potsdam Declaration and of the Instrument of Surrender

1 was to terminate the state of war then existing between
2 Japan and the Allied Powers, and goes on to submit
3 that crimes alleged to have been committed in Count 2
4 against China, and in Counts 25, 26, 35, 36, 51 and 52
5 against the Union of Soviet Socialist Republics, are
6 not within the jurisdiction of this Court because they
7 occurred at various dates in the past.

8 There are two fallacies in this contention:
9 The first is that the Instrument of Surrender termin-
10 ated a war. It did not; it terminated hostilities. A
11 state of war continues in the form of military occupa-
12 tion and will be terminated at some future date. The
13 second fallacy is that the Instrument of Surrender
14 dealt only with matters arising out of hostilities
15 commencing at any particular date. As far as China is
16 concerned, this is clear when one looks at paragraph 8
17 of the Potsdam Declaration which incorporates the Cairo
18 Declaration. The latter makes it clear that territor-
19 ies, including those referred to in Count 2, which
20 Japan had stolen from the Chinese, should be restored
21 to the Republic of China regardless of the date of the
22 theft or, at all events, going back to 1914. It also
23 deals with the freedom of Korea. Whether the war of
24 Japan against China should be regarded as continuous
25 from the 18 September, 1931 onwards or as having a

1 fresh start on 7 July, 1937, is one which the Tribunal
2 may find it necessary to determine on the facts. The
3 Indictment provides distinct Counts (2 and 3, and 18
4 and 19, and 27 and 28), enabling the Tribunal to give
5 effect to either view which it may take on this ques-
6 tion. In our submission, even if the Tribunal should
7 take the view (contrary to the submission that we shall
8 make), that those are to be regarded as separate wars,
9 there is nothing in the Charter, the Terms of Surrender
10 or the Potsdam Declaration to prevent the Tribunal from
11 exercising jurisdiction with regard to crimes commit-
12 ted by any of the defendants in connection with either
13 of them.

14 The same remarks apply with equal force to
15 the crimes against the Union of Soviet Socialist Re-
16 publics alleged in the counts above mentioned, so far
17 as they are based upon the same contention with regard
18 to time. It appears, however, that the objection to
19 those counts is also based upon a further contention
20 that the matters in question have been settled by cer-
21 tain alleged agreements, which are not before the Court
22 and must, together with the attendant circumstances,
23 be the subject of evidence. This is a matter which
24 the defendants can bring forward when they present
25 their case.

1 If the Tribunal thinks it better to postpone
2 giving any decision on either of the contentions
3 raised in Point II until they have heard the evidence,
4 the prosecution would raise no objection to this
5 course.

6 Point III begins by reiterating certain argu-
7 ments with regard to the meaning and purpose of the
8 Potsdam Declaration and the Instrument of Surrender,
9 which have already been dealt with. It goes on to put
10 forward the proposition that crimes cannot be charged
11 as being committed against any country which was not
12 at war with Japan on July 26, 1945, or was not one of
13 the Allied Powers mentioned in those documents, and
14 seeks to apply that contention to Counts 4, 16, 24 and
15 34 so far as they relate to Thailand, or Siam. The
16 argument, if well-founded, would be equally applicable
17 to the inclusion of that country in Count 5 and to the
18 inclusion of the Republic of Portugal in Counts 4 and
19 5 and in Counts 53, 54 and 55. In our submission,
20 however, there is no substance in it at all. There
21 is no limitation in paragraph 10 of the Potsdam Decla-
22 ration as to the countries against whom war crimes may
23 have been committed. There may be such limitation
24 with regard to prisoners for the obvious reason that
25 there could not be prisoners of war except those who

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21 is no limitation in paragraph 10 of the Potsdam Decla-
22 ration as to the countries against whom war crimes may
23 have been committed. There may be such limitation
24 with regard to prisoners for the obvious reason that
25 there could not be prisoners of war except those who

1 were nationals of countries at war. Again the mention
2 of Korea in the Cairo Declaration helps to make this
3 clear.

4 We ask, therefore, that the motion be dismis-
5 sed. We have not put before the Tribunal, at this
6 stage, our full arguments on the question of inter-
7 national law which it raises, but it is our earnest
8 hope that when the Tribunal comes to deliver its judg-
9 ment, after hearing full arguments, it will contain
10 authoritative pronouncements on these matters.

11 May I resume my seat while the interpreters
12 read it in Japanese?

13 THE PRESIDENT: I think we will hear the
14 translation after the recess. We will now recess for
15 ten minutes.

16 (Whereupon, at 1453, a recess was
17 taken until 1505, after which the proceedings
18 were resumed as follows, interpretation from
19 English to Japanese and Japanese to English
20 being made by OKA, Takashi of statements from
21 the floor, and from English to Japanese by
22 TSUCHIYA, Jun of the President's statements,
23 Hidekazu Hayashi acting as Monitor:)

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1 MARSHALL OF THE COURT: The Tribunal is
2 now resumed.

3 MR. COMYNS CARR: If it please the Tribunal,
4 I understand that copies of what I have been reading
5 are available for the Members of the Tribunal, if it
6 is convenient, and have been handed to the Secretariat.

7 THE PRESIDENT: We are very pleased to have
8 them.

9 MR. COMYNS CARR: The interpreters are now
10 ready to read the Japanese version.

11 (Whereupon, the Japanese translation
12 of Mr. Comyns Carr's speech was read by the
13 official interpreter.)

14 MR. COMYNS CARR: I should like to add a
15 few matters which had arisen in the course of the
16 argument this morning and which I had not, therefore,
17 dealt with in the remarks which I had prepared.
18 I would be obliged to the Tribunal.

19 The first point was an argument based upon
20 certain extracts from the British "Manual of Military
21 Law" issued to the British military forces. It is,
22 as appears from a glance at it, a short manual issued
23 for the guidance of the members of the forces and,
24 therefore, deals only with matters with which they are
25 directly concerned.

1 Paragraph 4 says: "The existing written
2 agreements which affect the military forces are * * *"
3 and then gives a list. But, it is well worth observing
4 that that list includes The Hague Convention of 1907
5 relative to the opening of hostilities, and also that
6 Paragraph 383 makes it clear to the soldier that he is
7 concerned and has a duty towards civilians as well as
8 members of the military forces opposed to him. It
9 reads: "It is the duty of the occupant to see that
10 the lives of inhabitants are respected, that their
11 domestic peace and honor are not disturbed, that their
12 religious convictions are not interfered with and
13 generally that ouress, unlawful criminal attacks
14 on their person and felonious actions as regards
15 their property, are just as punishable as in times
16 of peace."

17 And when one looks at the paragraph
18 which was quoted this morning, No. 441, and its
19 definition which is taken from the Second Volume of
20 Oppenheim, it is about as comprehensive as it could
21 be. The term "war crime" is the technical expression
22 for such an act of enemy soldiers and enemy civilians
23 as may be visited by punishment on capture of the
24 offenders.

25 As I understood the argument for the defense

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1 this morning, it was mainly based upon an allegation
2 that there was either a misunderstanding on the part
3 of the Japanese Government when they signed the terms
4 of surrender or even went so far as to suggest that
5 there was a breach of faith on the part of the Allied
6 governments in now including crimes against peace in
7 this Charter and the Indictment. On this point it is
8 material to decide, first of all, what do the words
9 "war criminal" in their true contents actually mean.
10 That I have dealt with, but it is also material to
11 consider what the representatives of the Allies explain
12 them as meaning, because if the Japanese Government un-
13 derstood quite well what the Allies meant by them, it
14 is useless for the defense now to complain of a breach
15 of faith on the ground of the effect being given to
16 that meaning; and it is from that point of view that I
17 submit that the quotations from leaders of the Allied
18 Nations which were cited by Mr. Keenan are material to
19 be considered by the Tribunal.

20 If the Japanese Government of that time were in
21 any doubt, as is suggested, about the meaning, it would
22 have been easy for them to have cleared it up by a
23 question. They did raise a question as to the future
24 position of the Emperor and they got a very prompt
25 answer.

1 Finally, I would submit this matter to the con-
2 sideration of the Tribunal. In order to rely upon a
3 misunderstanding or alleged breach of faith, it is nec-
4 essary for the defendants, amongst other things, to show
5 that they signed the surrender in the belief that war
6 criminals did not include these twenty-eight individuals,
7 and that they would not have signed those terms if they
8 had thought these twenty-eight individuals would have
9 been put on trial. That means that, rather than they
10 should be put upon their trials, they would have con-
11 tinued to subject the population of Japan to the fate
12 which Article 13 of the Potsdam Declaration describes
13 as "prompt and utter destruction."

14 If and when any of these defendants, including
15 three of them who were personally parties to the Terms
16 of Surrender, come to give their evidence, we shall be
17 interested to observe whether they will tell the Tri-
18 bunal that that would have been their course.

19 DR. KIYOSE: Mr. President.

20 THE PRESIDENT (Addressing Dr. KIYOSE): How
21 long will your reply take?

22 DR. KIYOSE: It will finish in about thirty
23 minutes.

24 THE PRESIDENT: Yes.

25 DR. KIYOSE: Mr. President, I believe that the

1 exchange of emotional words will not help the calm pro-
2 ceedings of this Tribunal. Therefore, I will choose
3 only the points relative to my argument and talk briefly
4 on this subject.

5 First, I would like to point out a few points
6 which I believe the Chief Counsel for the Prosecution,
7 Mr. Keenan, in his morning address and his afternoon's
8 address, and Mr. Comyns Carr, Associate Prosecutor for
9 Britain, entertained regarding my motion.

10 THE MONITOR: Correction.

11 (Whereupon, the official interpreter
12 repeated his interpretation as follows:)

13 First, I should like to speak on a few points
14 on which I believe I was misunderstood by Mr. Keenan and
15 by Mr. Comyns Carr in their addresses. First, I under-
16 stand thusly -- first, the special order, special pro-
17 clamation, which was issued on the occasion of the pro-
18 mulgation of the Charter, which is the basis of this
19 International Military Tribunal. In the second article
20 of this special order, it is stated that this order was
21 promulgated in accordance with the Terms of Surrender.
22 Therefore, the writer of this proclamation -- in other
23 words, the Supreme Commander for the Allied Powers --
24 also believed that the words "stern justice shall be
25 meted out," et cetera, was one of the terms of the sur-

1 render.

2 A surrender with terms is not an unconditional
3 surrender.

4 In the fifth article of the Potsdam Declaration
5 itself we find the words "Following are our terms."
6 Then why did Counsel Keenan and Comyns Carr use the
7 terms "unconditional surrender"? The term "unconditional
8 surrender" refers to the armed forces alone.

9 In the thirteenth article of the Potsdam Declara-
10 tion, we find the following words: "We call upon the
11 Government of Japan to proclaim the unconditional sur-
12 render of all the Japanese armed forces."

13 THE PRESIDENT: I suggest to you that "uncon-
14 ditional surrender" means free from any terms imposed
15 by the Japanese.

16 Go ahead.

17 DR. KIYOSE: Mr. President, will you wait
18 for me to finish my opinion of the term "unconditional
19 surrender" before giving your own? Will you allow me to
20 give my own opinion in a calm manner?

21 MR. PRESIDENT: You should know what is troub-
22 ling this Court in your arguments, but you may proceed
23 without any interruption as far as I am concerned.

24 DR. KIYOSE: By "surrender" we mean the abandon-
25 ment of arms by forces at the front, and their surrender

1 to the enemy. Therefore, even at the front, when one
2 side has given up arms and surrendered, certain terms
3 are permissible. For instance, in this treaty a promise
4 is made that those who have given up their arms shall
5 be permitted to return to their homes with the opportu-
6 nity to lead peaceful and productive lives. If there is
7 a country among the Allies which does not fulfill this
8 article, that country is violating the Potsdam Declara-
9 tion. As defense counsel, I sincerely pray that, for
10 the sake of world peace, such a country does not exist
11 in the world today.

12 The Instrument of Surrender, signed on Sep-
13 tember 2, 1945, was in accordance with the Potsdam
14 Declaration and only made provision for the surrender
15 of the armed forces. No provisions are made for the
16 unconditional surrender of either the Japanese govern-
17 ment or the Japanese people. In this Instrument of
18 Surrender, the unconditional surrender of Imperial
19 General Headquarters of the Japanese armed forces, and
20 of forces under Japanese control is recognized, but
21 there is no provision made whatsoever for the uncon-
22 ditional surrender of the Japanese government or the
23 Japanese people.

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1 In the fifth paragraph of the Instrument of
2 Surrender, Japan recognized that she would obey the
3 orders and directives of the Supreme Commander for the
4 Allied Powers. But this obedience was only to the orders
5 and directives of the Supreme Commander for the Allied
6 Powers which are in accordance with the terms of the
7 Potsdam Declaration and does not mean that we should obey
8 every single thing that the Supreme Commander should
9 command.

10 In the sixth paragraph, the Emperor and the
11 Japanese Government have undertaken to obey the orders
12 of the Supreme Commander for the Allied Powers; but as
13 is written in this paragraph, it is only for the purpose
14 of giving effect to that Declaration, and for any other
15 purpose there is not a single line in the Instrument of
16 Surrender which requires Japan to obey the Allied Powers.

17 If the "Crimes Against Peace" and "Against
18 Humanity" enumerated in Sections A and C of Article 5 of
19 the General Order 1 or General Order 20 to 25 are not
20 crimes coming under the scope of the Potsdam Declaration,
21 then General MacArthur is exercising an authority he does
22 not possess, and the Japanese people are not bound to obey
23 this order.

24 Next, Mr. Keenan made reference to the statement
25 issued at Moscow by President Roosevelt, Prime Minister

1 Churchill and Marshal Stalin, but this declaration was
2 issued against German atrocities and has nothing what-
3 soever to do with Japan. This is a point that I have
4 already pointed out, but I repeat it again here.

5 The speeches made by Marshal Stalin in 1942
6 and in 1943 are also the same. In President Roosevelt's
7 speech he has declared that war crimes shall be punished,
8 but he has not said that the planning or the preparing of
9 a war, whether aggressive or otherwise, is a war crime.

10 In the Cairo Declaration there is an article
11 calling for the unconditional surrender of Japan. But this
12 was a line of policy pursued during the war and, in order to
13 end the war before the Allied Forces invaded Japan, the
14 Potsdam Declaration was issued as a compromise measure.

15 Both Counsel Keenan and Counsel Comyns Carr have
16 referred to the Versailles Treaty of 1919. This is the
17 mistake. The Versailles Treaty provided that the Kaiser
18 should be tried for his offense and was accepted by Germany.

19 The MONITOR: Signed and accepted by Germany --
20 correction.

21 DR. KIYOSE: If, in the Potsdam Declaration, there
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1 was an article stating that those who planned and
2 prepared the present war should be tried, and Japan
3 had accepted such a declaration, then you would have
4 the right to try these criminals. There is no provision
5 in the Potsdam Declaration corresponding to Article 227
6 of the Versailles Treaty.

7 Here I would like to state that the Versailles
8 Treaty did not call the Kaiser's offense a crime, but an
9 offense. I would like to speak a little on why this
10 distinction was made. This is because, at the War Crimes
11 Punishment Committee, the American representative - the
12 famous Lansing, and Scott, the international lawyer,
13 declared that they could not agree to the definition
14 of the violation of an international treaty or of inter-
15 national law as a crime. And, therefore, the term
16 "offense" was adopted. The Japanese also at the time
17 accepted this opinion.

18 Therefore, of course, in reality the Kaiser
19 was not brought to trial because of the refusal of
20 Holland; but, even if he had been brought to trial, he
21 would not have been brought to trial as a criminal.
22 Therefore, I believe that to have referred to Article
23 227 of the Versailles Treaty is more of benefit to the
24 defense counsel than it is to the prosecution.

25 Next, in the League of Nations, being a

1 league of that nature, war was condemned. But even the
2 League of Nations never made a provision defining an
3 individual -- of a country waging aggressive war; an
4 individual, and not the country itself -- as a criminal.

5 In The Hague Convention of 1907, also, the
6 violation of treaties was not called a crime, nor were
7 individuals of countries violating treaties called
8 criminals.

9 In the Kellogg-Briand Anti-War Pact also, the
10 waging of war in violation of treaties was not called a
11 crime.

12 THE MONITOR: Correction: Waging of war as
13 well as violating treaties was not called a crime.

14 DR. KIYOSE: The word "crime" itself has a
15 definite meaning. It is a principle universally recog-
16 nized throughout the world that crime is an action
17 punishable by punishment. But, in the Anti-War Pact,
18 there is no provision for the punishment of countries who
19 have violated that pact; and, furthermore, in the pre-
20 amble it is stated that countries violating this pact
21 lose their rights under this pact.

22 Mr. Comyns Carr this afternoon quoted from
23 Stowell's "Treatise on International Law." With all due
24 respect for Mr. Comyns Carr's learned speech it is my
25 contention that one writer's writings on international

1 law do not constitute international law. It is true
2 that academic theories may become international law;
3 but, for this purpose, it is necessary that it be stated
4 by many scholars, that it be put into practice by the
5 various countries, that it be accepted by the International
6 Law Association, and that, in short, it be recognized
7 by all the people in the world as an internationally
8 recognized custom.

9 Stowell's contention that people can be tried
10 for crimes previous to the establishment of a law is
11 utterly contrary to the principle revered by all of us,
12 that is, of ex post facto law.

13 THE MONITOR: Correction: "Revered by you
14 gentlemen," not "all of us."

15 DR. KIYOSE: In no country in the world today
16 is the principle of trying a person, of conducting trials
17 against the principle of ex post facto law, accepted.
18 Even Mr. Comyns Carr is also aware of this fact, I be-
19 lieve.

20 There seems to be a misunderstanding regarding
21 our request for the deletion of the counts pertaining to
22 Murder. Murder, the category of murder which comes
23 under conventional war crimes, can be included in this
24 indictment. But I cannot but be surprised when "murder"
25 is defined as the killing of belligerents simply when

1 there has been no declaration of war, or that the killing
2 of several hundreds of thousands in a war begun in
3 violation of a treaty itself is murder.

4 Mr. Comyns Carr has taken up my argument of
5 this morning saying that the Potsdam Declaration ter-
6 minated the Pacific War, and he has argued on this point.
7 It may have been more correct if I had made a distinction
8 between the conclusion of war and the conclusion of
9 hostilities. As in our country the same term is used,
10 the same word is used for both terms. I made this mistake
11 and I shall correct it if it be permitted; but, even if I
12 do correct it, the meaning remains the same. That is,
13 since the Potsdam Declaration concluded the hostilities
14 in the Pacific, it does not cover wars other than the
15 Pacific War.

16 Both Mr. Keenan and Mr. Comyns Carr have said
17 that this trial must be conducted in order to protect
18 civilization. On this point, I, too, am in complete
19 agreement. But, by "civilization," do you not include the
20 terms "respect for treaties" and "impartiality of trials"?
21 If the true intent of the Potsdam Declaration is, as I
22 have said, I believe that it would be for the good of
23 civilization if this Indictment is rejected without any
24 consideration to the various arguments which have been
25 advanced hitherto.

1 Both Mr. Keenan and Mr. Comyns Carr referred
2 to speeches by the late President Roosevelt, but I
3 wish to be allowed to quote just one passage from the
4 present President Truman's message to Congress on Jan-
5 uary 1 of this year.

6 THE MONITOR: Correction! Message to Con-
7 gress pertaining to the budget.

8 MR. KEENAN: I object to this on the ground
9 of its obvious incompetency -- any remarks made at the
10 time mentioned by anyone.

11 THE PRESIDENT? You quoted, Mr. Chief Prose-
12 cutor, speeches of Marshal Stalin, the late President
13 Roosevelt, individual speeches. We do not take judicial
14 notice of those, nor have they been proved, but you
15 were allowed to proceed to quote them.

16 MR. KEENAN: If the Court please, I was al-
17 lowed to proceed to quote them when I said they would
18 have relevancy to the matter that was raised in the
19 motion, and that had to do with whether or not these
20 accused had due notice of the fact that they would be
21 prosecuted prior to the time of the surrender.

22 THE PRESIDENT: Now, that does not answer my
23 point.

24 MR. KEENAN: I would suggest, at this time
25 we have heard discourse very close to sedition in this

1 courtroom from this counsel. As a member of the
2 prosecution, I have no desire to participate in any
3 trial that does not have the fairest aspect, but I do
4 think we should be required to confine our comments to
5 relevant matters, and I make the objection upon that
6 obvious ground.

7 THE PRESIDENT: He is not pressing his
8 claim to quote President Truman.

9 MAJOR WARREN: May I be heard, sir, on this
10 point?

11 The question came up, and the President of
12 this Tribunal rightfully stated that the quotations
13 from the speech of the late President Roosevelt and
14 others were not material. We did not intervene when
15 the members of the Tribunal wished to hear those quo-
16 tations. We insist at this time that the Prosecutor
17 has set himself up to answer for the American citi-
18 zens on this question. We do not believe he has
19 that right because the defense, who are American
20 citizens -- some of us -- will answer. We submit,
21 sir, that the views of the present President of the
22 United States are material as reflecting the attitude
23 of the American people.

24 I do not know what he desires to quote
25 and do not know its import, but I ask the Tribunal.

1 that he be heard and that we be accorded the same
2 privileges that the prosecution has demanded for it-
3 self.

4 MR. KEENAN: If the Court please, my objec-
5 tion was not to the man who made the remarks which
6 are to be quoted because it is because of him that I
7 am here, but it is to the date that was mentioned
8 which clearly placed them without the grounds of rele-
9 vancy of anything being discussed in this motion. I
10 would like to have the date verified again. I under-
11 stood it to be January of this year.

12 THE PRESIDENT: What President Truman said
13 after the surrender really has no bearing on any issue
14 here or any point here.

15 The debate is closed. As far as we can
16 judge, nobody has anything to add.

17 (Whereupon, Dr. KIYOSE began to
18 speak in Japanese.)

19 THE PRESIDENT: You are speaking out of or-
20 der. No new matter has been introduced in the reply,
21 so you are not entitled to reply to Mr. Keenan. We
22 will consider the matter. We will reserve our de-
23 cision which will be given at a later date.

24 The motion in the paper in the name of some
25 of the defendants will be taken tomorrow at thirty

1 minutes past nine o'clock.

2 We will adjourn now until thirty minutes
3 past nine o'clock tomorrow morning.

4 (Whereupon, at 1650, an adjournment
5 was taken until Tuesday, 14 May 1946, at 0930.)

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